

121 FERC ¶ 61,220
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Northern Indiana Public Service Company and
Whiting Clean Energy, Inc.

Docket No. ER06-1260-001

ORDER CONDITIONALLY GRANTING LIMITED WAIVER

(Issued November 30, 2007)

1. On October 3, 2007, Northern Indiana Public Service Company (NIPSCO) and its affiliate, Whiting Clean Energy, Inc. (Whiting) (collectively, Applicants), filed an application requesting that the Commission expand its grant of a limited waiver of the prohibition regarding sharing market information by affiliates with market-based rate authority.¹ In this order, the Commission grants the limited waiver as requested, to the extent necessary to allow NIPSCO to carry out its responsibilities as a Balancing Authority. In addition, Applicants are directed to file revised market-based rate tariffs that comply with the requirements stated in Order No. 697,² which, among other things, require that they identify in those tariffs the waiver granted herein.³

¹ The Commission granted limited waiver of Applicants' codes of conduct in *Northern Indiana Public Service Co.*, 116 FERC ¶ 61,248 (2006) (*NIPSCO*).

² We note that in Order No. 697 the Commission revised and codified in its regulations the standards pertaining to market-based rates, including codifying as part of the affiliate restrictions in 18 C.F.R. § 35.39 the requirements that previously have been known as the market-based rate "code of conduct." *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007) (Order No. 697). Therefore, as discussed herein, we will treat Applicants' filing as a request for a limited waiver of the affiliate restrictions in 18 C.F.R. § 35.39(d)(1).

³ *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914.

Background

2. NIPSCO is an Indiana corporation that engages in the generation, transmission, and distribution of energy at wholesale and retail. According to Applicants, NIPSCO owns and operates generation facilities with a total capacity of approximately 3,000 MW located within its balancing authority area. They further state that on October 1, 2003, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) assumed functional control of NIPSCO's transmission assets.⁴ Applicants state that NIPSCO's affiliate, Whiting, owns and operates a 525 MW cogeneration facility located in NIPSCO's service territory.⁵

3. Applicants state that NIPSCO is a Balancing Authority as defined in the Functional Model of the North American Electric Reliability Council (NERC).⁶ According to Applicants, as a Balancing Authority, NIPSCO must balance the generation resources and the energy flows into and out of its balancing authority area with the load requirements within the balancing authority area. They note that the Commission granted a limited waiver of their codes of conduct so that, as a Balancing Authority, NIPSCO would have access to real-time information regarding the amount of energy being delivered to the NIPSCO system from all sources, including Whiting's facility.⁷

4. In the previous application for limited waiver of their codes of conduct, Applicants stated that Whiting provides information to NIPSCO by means of a direct computer link between the Whiting facility and NIPSCO's control center and that under normal operating circumstances Whiting employees do not speak with NIPSCO employees when providing the information on real-time output. Applicants stated that Whiting's employees may communicate directly with NIPSCO employees if the plant is

⁴ See Transmittal Letter at 3.

⁵ Whiting's facility is directly interconnected to NIPSCO's transmission system and is not directly interconnected with transmission facilities owned by any other utility. Whiting's facility qualifies as an exempt wholesale generator and Whiting has been granted market-based rate authority. See *Whiting Clean Energy, Inc.*, 95 FERC ¶ 62,208 (2001), *Whiting Clean Energy, Inc.*, Docket No. ER01-1300-000 (May 24, 2001) (unpublished letter order). In addition, Whiting's most recent updated market power analysis was accepted by the Commission in *Northern Indiana Public Service Company*, 111 FERC ¶ 61,041 (2005).

⁶ NIPSCO states that as a Balancing Authority, NIPSCO must comply with the obligations imposed by NERC, ReliabilityFirst (a NERC-approved regional reliability organization) and Midwest ISO, NIPSCO's Reliability Coordinator.

⁷ See *NIPSCO*, 116 FERC ¶ 61,248.

experiencing operational problems or at the direction of Midwest ISO if the transmission system is undergoing an emergency. Applicants also stated that employees known as Generation System Supervisors (GSS)⁸ are located at NIPSCO's control center and these employees use the real-time information to ensure that NIPSCO's system remains in balance. Applicants further stated that neither NIPSCO employees engaged in wholesale marketing or in the sale or purchase of transmission service nor Whiting employees are located in the control center. Applicants further stated that, consequently, no NIPSCO marketing personnel have access to Whiting's real-time information provided to NIPSCO's Generation System Supervisors.⁹ Based on these representations, the Commission granted waiver of the codes of conduct to the limited extent necessary to permit Whiting to provide NIPSCO with real-time information needed by NIPSCO to carry out its responsibilities as a Balancing Authority.

5. The Commission's regulations, among other things, restrict a franchised public utility with captive customers and a market-regulated power sales affiliate from sharing market information if such sharing could be used to the detriment of captive customers unless simultaneously disclosed to the public.¹⁰ Applicants state that the Commission should grant an additional limited waiver of the affiliate restrictions with regard to market information sharing to permit Whiting to provide any and all generation information to NIPSCO operating personnel to allow NIPSCO to carry out its duties as a Balancing Authority. They note that the type of information shared between NIPSCO and Whiting is identical to the information NIPSCO must have from its own generating units or from generating units owned by third parties within its balancing authority area in order to comply with its obligations as a Balancing Authority. Applicants state that granting the waiver will have no effect on wholesale markets because no NIPSCO employees engaged in marketing activities will have access to the Whiting information.

⁸ Applicants represent that the GSS are responsible for tracking the amount of energy being delivered to or flowing out of NIPSCO's system from all sources, including the Whiting facility. Applicants further state that the GSS have no duties with respect to wholesale energy or natural gas markets and do not purchase or sell transmission service.

⁹ See *NIPSCO*, 116 FERC ¶ 61,248 at P 4.

¹⁰ 18 C.F.R. § 35.39(d)(1). "Market Information" is defined in 18 C.F.R. § 35.36(a)(8) as "non-public information related to the electric energy and power business including, but not limited to, information regarding sales, cost of production, generator outages, generator heat rates, unconsummated transactions, or historical generator volumes."

Notice of Filing and Responsive Pleadings

6. Notice of the Applicants' October 3, 2007 filing was published in the *Federal Register*, 72 Fed. Reg. 58,837 (2007), with interventions and protests due on or before October 24, 2007. None was filed.

Discussion

7. As noted above, the Commission has codified in 18 C.F.R. § 35.39, the affiliate restrictions previously known as the market-based rate code of conduct.¹¹ Therefore, we consider Applicants' request to be a request for waiver of the market information sharing regulations codified at 18 C.F.R. § 35.39(d)(i). We will grant the request for waiver for the reasons stated below, subject to Applicants making a compliance filing as discussed below.

8. Applicants assert that, as a result of NERC's efforts to establish mandatory reliability standards applicable to Balancing Authorities, NIPSCO as a Balancing Authority must have access to information regarding the amount of energy being delivered to its system from all sources, including interties with other Transmission Operators, NIPSCO-owned generation and generation owned by third parties. As a Balancing Authority, Applicants claim NIPSCO must also have access to day ahead and other advance information regarding Whiting's operations and plans in order to comply with the mandatory reliability requirements. Applicants emphasize that failure to comply with the mandatory reliability standards may expose NIPSCO to enforcement actions that could result in substantial monetary fines.

9. In addition, Applicants state that NIPSCO must have access to information regarding Whiting's status in order to comply with the Midwest ISO requirements concerning the Midwest ISO Balancing Authority alignment initiative¹² and, in

¹¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 467.

¹² The Commission understands that the Midwest ISO Balancing Authority alignment involves the functional consolidation of numerous balancing authority areas within the Midwest ISO footprint into one Balancing Authority to accommodate the Midwest ISO's development of an Ancillary Services Market (ASM). According to the Applicants, the Midwest ISO will be responsible for balancing requirements under ASM and the duties of local balancing authorities will be revised. Applicants also state that the Midwest ISO is in the process of developing a reversion plan for use with the ASM that will be placed in effect should the ASM fail (Reversion Plan). The current draft of the Reversion Plan requires Local Balancing Authorities such as NIPSCO to utilize all generation resources – including independent generators – to balance load and generation.

particular, that without information regarding Whiting, NIPSCO is unable to utilize the Whiting facility when acting as a Local Balancing Authority under the ASM.

10. Lastly, Applicants state that pursuant to the Midwest ISO Balancing Authority alignment, NIPSCO would be responsible for emergency operations under severe system conditions. They assert that NERC's Emergency Operation Standards require Balancing Authorities and Transmission Operators to utilize all generation at their disposal in order to maintain the electric system and to permit system restoration. Applicants state that these obligations require NIPSCO to maintain open communications with all generators within its Balancing Authority area during emergencies.¹³

11. The Commission has waived the affiliate restrictions (formerly referred to as "code of conduct") in cases where there are no captive customers (and thus no potential for affiliate abuse) or where the Commission is satisfied that the utility's captive wholesale and retail customers are adequately protected against affiliate abuse.¹⁴ As discussed below, based on the facts and circumstances presented, we will grant a limited waiver of the prohibition against sharing market information to the extent necessary to allow NIPSCO to carry out its responsibilities as a Balancing Authority.

12. Order No. 697 provides among other things, that unless simultaneously disclosed to the public, market information may not be shared between a franchised public utility with captive customers and a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers.¹⁵ Applicants submit that under the circumstances presented herein, a limited waiver of the restriction against market information sharing will not result in any potential for affiliate abuse because NIPSCO does not dispatch the Whiting facility. Applicants state that no NIPSCO marketing

¹³ The Commission notes that in emergency circumstances affecting system reliability, a market-regulated power sales affiliate and the franchised public utility with captive customers may take necessary steps to keep the bulk power system in operation. The Commission further states that the relaxation of the requirements during system emergencies is intended to ensure that the franchised public utility with captive customers and market-regulated power sales affiliate(s) can maintain reliability of the power grid. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 567.

¹⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 492; *see, e.g., CMS Marketing, Services and Trading Co.*, 95 FERC ¶ 61,308 (2001); *Green Power Partners I LLC*, 88 FERC ¶ 61,005 (1999).

¹⁵ *See* 18 C.F.R. § 35.39(d)(1); Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 594.

personnel will have access to the Whiting information provided to the NIPSCO transmission function and Balancing Authority personnel.¹⁶

13. Based on Applicants' representations that NIPSCO will use only NIPSCO-owned generation to perform its duties as Balancing Authority and NIPSCO as a Balancing Authority must have access to information regarding the amount of energy being delivered to its system from all sources, including interties with other Transmission Operators, NIPSCO-owned generation and generation owned by third parties, we will grant the request to waive the prohibition against sharing market information to the limited extent necessary to permit Whiting to provide NIPSCO with the information needed to carry out its responsibilities as a Balancing Authority and reliably operate the transmission system in accordance with the requirements of NERC, ReliabilityFirst, and Midwest ISO.¹⁷

14. We emphasize that the waiver that we grant herein applies only with regard to information provided by Whiting to NIPSCO, and only such information as is required by NIPSCO to perform its duties as a Balancing Authority. The type of information for which Whiting is granted waiver is limited to the same information that NIPSCO obtains from its other generating units owned by third parties within NIPSCO's balancing authority area in order to comply with its obligations as a Balancing Authority. We remind the NIPSCO employees who perform the balancing duties that they are prohibited from being a conduit for improperly sharing Whiting's generation information. Specifically, the no-conduit rule allows permissibly shared employees to receive market information so long as they are not conduits for sharing that information with employees that are not permissibly shared.¹⁸ Further, we expect both NIPSCO and Whiting to abide by the remaining provisions of their tariffs as modified by Order No. 697.

¹⁶ We note that in this application for limited waiver, Applicants did not describe, as they did in the previous waiver request, the procedure for communication of information necessary for NIPSCO to act as the Balancing Authority for the Whiting facility. Our grant of a limited waiver here is contingent upon Applicants continuing, for purposes of Balancing Authority activities, the communication procedures outlined in paragraph 4 and in Applicant's original July 19, 2006 request for limited waiver of their codes of conduct.

¹⁷ We note that our decision here is consistent with the exception in the standards of conduct permitting information that is necessary to maintain the operations of a transmission system to be shared between Transmission Providers and their Energy Affiliates.

¹⁸ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 914.

15. In addition, Order No. 697 requires that the next time (after September 18, 2007, the effective date of Order No. 697) that a market-based rate seller proposes a tariff change, makes a change in status filing, or submits an updated market power analysis, such seller must make a section 206 compliance filing to modify its existing tariff to comply with Order No. 697.¹⁹ One of the standard required provisions adopted in Order No. 697 specifies that a seller list all limitations on its market-based rate authority as well as exemptions from or waivers granted of Commission regulations, including relevant citations to Commission orders.²⁰ In the instant filing, Applicants have failed to include a revised tariff incorporating the requirements in Order No. 697. Therefore, Applicants are directed within 30 days of the date of issuance of this order to submit compliance filings modifying their existing tariffs to identify the waiver granted herein as well as the previously granted code of conduct limited waiver and to make any other modifications necessary to make their tariffs compliant with the directives of Order No. 697.

The Commission orders:

(A) A limited waiver of the prohibition against sharing market information is hereby conditionally granted as discussed above, subject to the compliance filing ordered below.

(B) Within thirty days of the date of this order, Applicants are directed to file revised market-based rate tariffs that are consistent with this order and the requirements of Order No. 697, as discussed herein.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁹ *Id.* P 923.

²⁰ *Id.* at Appendix C.